Attachment I

EPA MEMORANDUM TO REGIONAL OFFICES ALLOWING CONTINUED OPERATION OF HAZARDOUS WASTE FACILITIES FAILING INTERIM STATUS STANDARDS

(July 31, 1981)

MEMORANDUM

SUBJECT: RCRA, Section 3005(e); Continued Operation of Hazardous Waste Facilities by Owners or Operators Who Have Failed to Achieve Interim Status

TO: Enforcement Division Directors Regions I to X

FROM: Douglas MacMillan, Director Office of Waste Programs Enforcement (WH-527M)

A November 19, 1980, Federal Register notice (45 FR 76630) solicited comment on enforcement and regulatory policies which the Agency was considering to deal with facilities which miss the notice and application filing deadlines for interim status pursuant to RCRA, Section 3005(e). Several comments were received from the public and from Regional personnel regarding these policies. The comments revealed some confusion regarding the requirements for achieving interim status under the Act. Accordingly, this memorandum provides a discussion of the statutory and regulatory prerequisites for achieving interim status, a discussion of the authority of the Agency to allow the continued operation of hazardous waste facilities by owners or operators who have failed to achieve interim status, and guidance regarding the exercise of that authority.

A. Conditions for Achieving Interim Status

When Congress specified in Section 3005 of RCRA that all treaters, storers, and disposers of hazardous waste must obtain a permit, it recognized that EPA would not be able to issue permits to all such persons before the Subtitle C program became effective. Consequently, Congress passed in Section 3005(e) that a facility owner or operator meeting certain conditions would be treated as having been issued a permit until final administrative action is taken on the facility's permit application. This statutorily conferred temporary authorization to operate is commonly referred to as "interim status", — the title of the subsection by which it was created. Section 3005(e) sets forth requirements for qualifying for interim status. EPA elaborated on those requirements in the Consolidated Permit Regulations, 40 CFR 122.22 and 122.23, as amended on November 19, 1980. Read together, these provisions provide that a person who:

(1) owns or operates a facility which is required to have a permit under Section 3005 and which was in existence on November 19, 1980;

(2) has complied with the requirements of Section 3010(a) of RCRA, regarding notification of hazardous waste activity; and

(3) has complied with the requirements of 40 CFR 122.22(a) and (c), governing submission of Part A applications shall be treated as having been issued a hazardous waste facility permit until such time as final administrative disposition of the facility's permit application is made.

An essential feature of "interim status" (and the source of confusion within both the regulated community and the Agency) is that, unlike a permit, it is not granted or conferred by EPA. ° Rather, it is conferred directly by statute. Any person meeting the above three statutory requirements automatically qualifies for interim status. The only exception is where it can be shown that final disposition of an application has not been made because the applicant has failed to provide necessary information. (See, Section 3005(e)). In addition, the failure of an owner or operator to furnish a requested Part B application on time, or to furnish in full the information required by the Part B application, is grounds for termination of interim status. (40 CFR 122.23(a)(3).)

The Agency has provided guidance regarding each of these three prerequisites for achieving interim status, as follows.

1. Requirement that the Facility Be in Existence on November 19, 1980

The first statutory prerequisite for obtaining interim status is that the owner's or operator's facility be "in existence on November 19, 1980." (Section 3005(e).) Interpretation of this requirement can be found at 45 FR 33068-69 and 33323-24 (May 19, 1980), 45 FR 76633-34 (November 19, 1980), and 46 FR 2344-48 (January 9, 1981), attached hereto.

2. Requirement that the Owner or Operator Comply with Section 3010(a)

Section 3010(a) of RCRA requires an owner or operator of a facility for the treatment, storage or disposal of a hazardous waste identified or listed in regulations promulgated under Section 3001 not only to file a notification, but to file the notification within ninety days. For example, a person who was required to notify as a result of the publication of EPA's May 19, 1980, regulations and did not file a notification by August 18, 1980, has not "complied with the requirements of Section 3010(a)" and has not achieved interim status. (Section 3005(e); 40 CFR 122.23(a)(1).) Further discussion is provided at 45 FR 76631-33 (November 19, 1980), attached.

3. Requirement that the Owner or Operator File an Application Under Section 3005

The final statutory condition for achieving interim status is that the owner or operator of a facility have "filed an application under ... section [3005]". EPA's regulations implementing Section 3005 condition eligibility for interim status on a facility's having "complied with the requirements of §122.22(a)... governing submissions of Part A applications." (See, 40 CFR 122.23(a)(2)).

Section 40 CFR 122.22(a) formerly required that all owners and operators of existing hazardous waste treatment, storage, or disposal facilities submit Part A of their permit application by November 19, 1980. The section was amended on November 19, 1980, to redefine the deadline for filing Part A applications. 40 CFR 122.22(a)(1) now provides:

"Owners and operators of existing hazardous waste management facilities must submit Part A of their permit application to the Regional Administrator no later than (i) six months after the date of publication of regulations which first require them to comply with the standards set forth in 40 CFR Parts 264 or 265, or (ii) thirty days after the date they first became subject to the standards set forth in 40 CFR Parts 264 or 265, whichever first occurs."

Accordingly, a facility at which a *solid* waste was handled prior to November 19, 1980, is eligible for interim status

if its owner or operator files a Section 3010 notification within ninety days (if so required) and a Part A permit application within six months after EPA promulgates regulations designating such solid waste as a hazardous waste.

Further, a facility which handled hazardous waste prior to November 19, 1980, but was not required to apply for a permit because of a regulatory exemption, may qualify for interim status if its owner or operator files a Part A permit application within 30 days after losing its exemption. (*e.g.*, a generator who produced hazardous waste prior to November 19, 1980, who after November 19, 1980, accumulates for the first time hazardous waste on-site for longer than 90 days.) As noted in the Federal Register notice pertaining to the amendment, some of the facilities which will qualify for interim status by virtue of 40 CFR 122.22(a)(1)(ii) technically may be operating without a permit until they submit their permit application. (45 FR 76633, November 19, 1980, attached.) Consequently, these handlers have been given notice that "*EPA will not initiate any enforcement action against them* ... if they notify their EPA Regional Office immediately and file an application within the thirty-day period." *Id.*

In addition, the Agency may by compliance order issued under Section 3008 of RCRA extend the date by which the owner or operator of an existing hazardous waste management facility may submit Part A of its permit application. (40 CFR 122.22(a)(3).)

Guidance regarding interim status and the owner's or operator's obligation to file a Section 3010 notification and a timely Part A application is found at 45 FR 76633 (November 19, 1980), and 45 FR 33321-24 and 3354 (May 19, 1980), attached. Further guidance regarding the exercise of a Region's discretionary authority to extend the date for submitting a Part A permit application is provided in Section D of this memorandum.

B. Section 3005(e) and Enforcement Discretion

Subtitle C provides that, upon the effective date of the regulations identifying and listing hazardous wastes, "the treatment, storage, or disposal of any such hazardous waste is *prohibited* except in accordance with such a permit." (Section 3005(a) (emphasis added).) Consequently, any person treating, storing or disposing of hazardous waste without a permit or without having achieved interim status may be ordered by the Agency to cease that operation (Section 3008(a)), may be subject to civil penalties (Section 3008(c,g)), and may be subject to fine and imprisonment (Section 3008(d)).

Congress' intent in enacting the sanctions in Subtitle C was to "permit a broad variety of mechanisms so as to stop the illegal disposal of hazardous wastes" (H.R. Rep. No. 1491, 94th Cong., 2d Sess., at 31). In most cases in which a Region determines that a person has treated, stored or disposed of hazardous waste in violation of Section 3005(a), prompt administrative or judicial action should be brought seeking cessation of the violation and, if determined to be appropriate, assessment of a penalty.

The Agency recognizes that the literal construction of Section 3005(e) will have the effect of preventing owners or operators of certain well-managed facilities from qualifying for interim status. In order to provide relief where appropriate, Congress has provided that enforcement under Subtitle C is discretionary. (Section 3008(a)(1)). *Cf.*, *Commonwealth of Kentucky ex rel. Hancock v. Ruckelshaus*, 497 F.2d 1172 (6th Cir. 1974), *aff'd*, 426 U.S. 167 (1976); *Corn Refiners Association, Inc. v. Costle*, 594 F.2d 1223, 1225, 1226 (8th Cir. 1979); *Weyerhauser Co. v. Costle*, 590 F.2d 1011,11056-58 (D.C. Cir. 1978); *United States v. Olin Corp.*, 465 F. Supp. 1120, 1136 (W.D.N.Y. 1979); *Committee for Consideration of Jones Falls Sewage System v. Train*, 387 F. Supp. 526, 529-30 (D. Md. 1975).

Although EPA cannot consider facility owners or operators who have failed to satisfy the statutory requirements of Section 3005(e) as having achieved interim status, the Agency may exercise its enforcement discretion to allow such facilities to continue operating where the continued operation would be in the public interest. *Cf.*, *State Water Control Board v. Train*, 559 F.2d 921, 927 (4th Cir. 1977); *Sierra Club v. Train*, 557 F.2d 485 (5th Cir. 1977); *New Mexico Citizens for Clean Air and Water v. Train*, 6 ERC 2061, 2065 (D.N.M. 1974). Policies referenced in the November 19, 1980, Federal Register notice (45 FR 76630-36) have been developed to provide relief in these situations.

C. Allowing the Continued Operation of a Facility by an Owner or Operator Who Has Failed to Achieve Interim Status

Although the enforcement authority of Section 3008 vests discretion in the Agency, courts have held that "the exercise of prosecutorial discretion, like the exercise of executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review." *Nader v. Saxbe*, 497 F.2d 676, 679-80 (D.C. Cir. 1974).** See, in particular, "Reviewability of Prosecutorial Discretion: Failure to Prosecute," 75 Colum. L. Rev. 130 (1975). If the Region determines, in the exercise of its enforcement discretion, to allow the continued operation of a facility by an owner or operator who has failed to achieve interim status, it must do so rationally and in good faith. In addition, the Agency may be required to state the factors upon which it relied in deciding not to bring a particular enforcement action. See discussions in *Bachowski v. Brennan*, 502 F.2d 79 (3rd Cir. 1974), *rev'd in part*, *Dunlop v. Bachowski*, 421 U.S. 560 (1975); *Environmental Defense Fund v. Hardin*, 428 F.2d 1093, 1099-1100 (D.C. Cir. 1970). Consequently, each Region's exercise of enforcement discretion must be based upon evidence that will permit the reasonableness of its decision to be later demonstrated.

In the context of an owner's or operator's failure to achieve interim status, the exercise of enforcement discretion should require consideration of such factors as:

- the harm (or benefit) to the environment that will result from the facility's continued operation;
- the circumstances surrounding the failure of the owner or operator to meet the requirements of Section 3005(e);
- the compliance history, if any, of the owner or operator including his recalcitrance or good faith efforts to comply (both with regard to the subject facility and any other facility for which the owner or operator is responsible);
- the availability of enforcement resources;
- the importance of the violation in comparison with other violations; and,
- the extent to which the owner or operator should have known of RCRA's regulatory requirements (presumably, a commerical off-site hazardous waste management facility should be held to a somewhat higher standard of knowledge of the regulations than should a generator with a relatively small on-site facility that is operated in support of and incident to the generator's primary line of business); and,
- fairness and equity.

If there is insufficient information in the Region's files to make a decision based upon the above criteria, the Region may instruct the owner or operator to submit relevant information within a reasonably prompt period of time. In many instances, an EPA inspection will be necessary to verify the information submitted or to gather new information.

The Regional Office should keep a careful record of all actions allowing, or disallowing, the continued operation of a facility by an owner or operator who has failed to achieve interim status. Decisions to allow such continued operation should be accompanied by a statement, as detailed as practicable, of the reasons supporting the action.

D. Providing Notice to the Owner or Operator, and the Public, of the Exercise of Enforcement Discretion

If the Region determines to allow the continued operation of a facility whose owner or operator has failed to achieve interim status, the Region may have no legal obligation to formally advise the owner or operator of that decision. In virtually all instances, of course, it will be appropriate to provide notice in order, for example, to apprise the public of the Region's determination, inform transporters or generators using the facility of the exercise of enforcement discretion, and most importantly, to aid the owner/operator by advising him/her that the operation of the facility will be allowed to continue despite the failure to meet the requirements for achieving interim status.

1. Facilities Failing to Provide Timely Notification under Section 3010.

Compliance orders issued under Section 3008 of RCRA (with or without a civil penalty assessment) may be used to provide notice of the Region's decision to allow the continued operation of a facility provided that that notice is part of a broader set of compliance requirements. (Neither a compliance order nor an interim status compliance letter (see below) serve to "grant" interim status to a facility which failed to timely notify. Such a facility can never actually have interim status. (See pages 2-3).) A compliance order obviously must be used if an administrative penalty is being assessed. (Section 3008(c).) Penalties of at least $100 for each month the notification was overdue would ordinarily be appropriate. In most instances where a notification was more than six months late, penalties should be assessed. If the violator is an off-site commercial hazardous waste management facility, higher penalties and a shorter grace period should be considered. A compliance order also has the advantage of clearly requiring an owner or operator to comply with interim status standards (40 CFR Part 265), thereby making it difficult for the owner or operator to argue that such standards do not apply to him and also preventing him from attaining any unfair advantage over competitors who did comply with the requirements for achieving interim status. (See, 40 CFR 265.1(b).) A compliance order also provides the alleged violator with a clear remedy if the person believes that he is not in violation of the Act. (See 40 CFR 22.15.)

In addition, a compliance order may provide for more certain imposition of penalties in the event that there is a subsequent violation of RCRA. (See, Section 3008(a)(3).) An administrative consent order may also provide an admission by the owner or operator regarding the applicability of, for example, the interim status standards, and the reasonableness of other obligations imposed by the order.

A form complaint prepared pursuant to the Consolidated Rules of Practice, 40 CFR Part 22, is appended as Attachment 2.

The Regions may also issue Interim Status Compliance Letters (ISCL's) to provide notice to owners and operators of qualifying facilities that they will not be prosecuted for operating without having achieved interim status, providing they comply with the conditions set forth in the ISCL. An ISCL should be issued only upon request of the facility. Ordinarily, firms such as off-site treatment, storage or disposal facilities whose business is solely or primarily hazardous waste management should receive compliance orders rather than ISCL's. In no event should an ISCL be issued to a facility which notifies later than one year after the required date, or after September 18, 1981, which ever occurs later.

An ISCL should contain the following specific elements:

a. Reference to the particular facility (by name and location) and the owner or operator with regard to which the action is being taken.

b. A statement that the ISCL is an exercise of enforcement discretion.

c. A statement that the enforcement authority will exercise its discretion and not seek to cease the treatment, storage, or disposal of hazardous waste by the owner or operator at the referenced facility, on the condition that:

(1) the owner and operator comply fully with the terms of the ISCL,

(2) the owner and operator comply fully with the Interim Status Standards, 40 CFR Part 265, and applicable Consolidated Permit Regulations, 40 CFR Parts 122 and 124, within time periods set forth in the ISCL,

(3) circumstances do not occur which would warrant modification of the Agency's exercise of enforcement discretion, and

(4) circumstances do not occur which would warrant an action under Section 7003 of RCRA.

d. A statement that the ISCL does not preclude the possibility of citizen suits under Section 7002 of RCRA. Since an ISCL should only be issued after a careful determination that such an exercise of enforcement discretion is in the public interest, few such actions by third parties are anticipated. It is nevertheless important to everyone concerned to be aware that the possibility of such an action exists.

e. A statement that the exercise of enforcement discretion expressed in the ISCL shall terminate at the time that final administrative disposition of the permit application for the subject family is made.

f. The ISCL should be signed by the appropriate Regional supervisor of hazardous waste enforcement activities to underscore the fact that it is an exercise of enforcement discretion.

g. Where appropriate, an ISCL may contain provisions shielding generators and transporters using the facility from Federal prosecution for sending wastes to an unpermitted facility.

A model ISCL is appended as Attachment 1. It is emphasized that it is only a sample and each ISCL must be carefully drafted, within the guidelines set forth above, to cover the particular situation at issue.

Written agreement to the owner or operator that the terms of the ISCL (including the schedule for filing, and compliance with the interim status standards and consolidated permit regulations) are reasonable and achievable, and that the owner or operator will comply with them should be obtained. (See Attachment 1)

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2. Facilities Failing to File Part A of their Permit Application on Time.

A new provision of the Consolidated Permit Regulations was promulgated on November 19, 1980, and provides:

"The Administrator may by compliance order issued under Section 3008 of RCRA extend the date by which the owner and operator of an existing hazardous waste management facility must submit Part A of their permit application." (40 CFR 122.22(a)(3).)

A purpose of the amendment is to allow a facility that inadvertently missed the filing deadlines set forth in 40 CFR 122.23(a) to nevertheless obtain interim status. (45 FR 76633, November 19, 1980.)

The November 19 amendment recognizes the differences in effect in failing to comply with 3010(a) and failing to file a timely Part A. Section 3010(a) sets a requirement to notify within a set period for a specified class of facilities, and this is a condition for achieving interim status. Failure to meet that deadline, if required to do so, results in failure to achieve interim status. However, Section 3005(e)(3) only requires submission of a permit application without specifying a deadline. EPA, through its regulations, originally set a deadline of November 19 for submission of Part A's. The regulatory amendment reflects the Agency's recognition that, unlike the deadline for notification, the deadline for Part A's is not statutorily required and that EPA may, therefore, administratively adjust that deadline to allow facilities submitting late Part A's to achieve interim status.

Issuance of an order extending the Part A permit application deadline requires consideration of the same factors set forth in Section C of this memorandum. As previously noted, the Region should consider the harm or benefit to the environment that will result from the facility's continued operation, the circumstances surrounding the failure of the owner or operator to meet the Part A filing deadline, the owner's or operator's compliance history, the availability of enforcement resources, the importance of the violation in comparison with other violations, the knowledge of the statutory and regulatory requirements which that type of facility had or should have had, and other equitable considerations.

As §122.22(a)(3) deals specifically with this situation, compliance orders rather than ISCL's should be used to allow such a facility to continue in operation. If a late (after November 19, 1980, or other applicable date) Part A application has already been submitted, the order should include a statement that the application has been accepted as if timely filed, conditioned upon compliance with the terms of the order. If no Part A has been received, a deadline for its submission should be specified. (Ordinarily, this should not be more than thirty days from the date of issuance of the order.) (See Attachment 2, Page 2.3.) A decision as to whether to assess a penalty should be based on the same criteria as set forth for late notifiers on pages 6 and 7.

3. Failure to Meet the Definition of "In Existence."

The effect of the "in existence" requirement, which was previously discussed, is to assure that "new" facilities are constructed only after they have obtained a permit. As this provision is of central importance to the Act, it is anticipated that few if any facilities not "in existence" on November 19, 1980 will be allowed to begin or continue operations without having been issued the appropriate EPA or State permit. If a Region feels that such a facility should be allowed to operate, all appropriate headquarters offices should be contacted in advance to discuss the appropriate mechanism to allow such operation.

If you have any questions regarding this guidance, you should contact Jim Bunting, Acting Director, Legal Division, Office of Waste Programs Enforcement (WH-527M) FTS-382-2950.

cc: Directors, Air and Hazardous Materials Divisions, Regions I and III — X, Director, Water Division, Region II

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* EPA representatives, however, have upon request apprised hazardous waste management facilities what the various prerequisites to interim status are and how they can be met, and in certain situations, have ventured opinions as to whether particular facilities appear to have met those prerequisites. An EPA opinion that a facility appears to have met the statutory prerequisites for interim status (which should in no way be confused with a "grant" of interim status) does not ultimately dispose of the issue of whether a facility has interim status. Nor does an EPA opinion preclude a private citizen from forcing a judicial resolution of the issue under the RCRA citizen suit provision, Section 7002(a)(1). If not carefully drafted, such an opinion might, however, complicate future enforcement actions, based on subsequently obtained information, brought against the facility for operating without a permit or interim status. Recommendations regarding such opinions have consequently been set forth in a memorandum (attached) to Headquarters and Regional RCRA personnel.

** There is, however, authority supporting the position that a court may not review EPA's decision not to commence an action under §3008, either because such a decision is committed to agency discretion by law (*cf., Commonwealth of Kentucky, supra*) or because there exists an adequate remedy at law under the Act's citizen suit provision, Section 7002 (*cf., Hall v. Equal Employment Opportunity Comm.*, 456 F. Supp 693 (N.D. Calif. 1978)). EPA will likely rely upon such authority in the event that a decision by the Agency to decline to bring an enforcement action is challenged.